NO. 93-929

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERCONTINENTAL BULKTANK CORPORATION
Petitioner

VERSUS

JOHN E. JORDAN
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Court should grant *certiorari* to resolve a longstanding split in the circuit courts as to whether arbitrary and capicious delay by a vessel owner in paying maintenance and cure to a seaman can give rise to punitive damages, as a matter of law. Punitive damages are allowed by the First and Fifth Circuits based upon the dissenting opinion in *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997 (1962). The Second Circuit, following the majority opinion in *Vaughan*, allows only compensatory damages and attorneys' fees.

2. Alternatively, if punitive damages are available in such cases as a matter of law, the Court should grant *certiorari* because in the instant case, there was insufficient evidence to support such an award, in violation of petitioner's right to due process of law. There was no award of compensatory damages relating to this issue, no evidence of the motive of petitioner, a vessel owner, for delay in payment of maintenance and cure and no evidence of malice. There was evidence that cure was not timely paid because petitioner relied upon plaintiff's union to make timely payments, as required by the collective bargaining agreement between the union and petitioner.

3. The Court should grant *certiorari* because petitioner's right to due process was violated by failure of the courts below: (a) to apply the evidence in the record to the appropriate standards in determining

propriety of the amount of punitive damages awarded in this case; (b) to instruct the jury and thereby provide minimum guidance in assessing punitive damages; (c) to conduct a sufficient post-verdict review; (d) to grant a mistrial or a reversal when plaintiff's counsel was allowed to testify on punitive damages and to refer in argument to another case where petitioners allegedly were assessed punitive damages, when there was no evidence of such and, when plaintiff fraternized with the jury during the course of the trial; and (e) in holding petitioner to an improper and unconstitutional burden of proof on its motions for mistrial, specifically, requiring petitioner to show it was "impossible" for it to receive a fair trial.

4. The Court should grant *certiorari* as the courts below erred in applying the law by allowing the jury to award separate damages for both: (a) mental pain and suffering and (b) mental anguish, resulting in double recovery.

LIST OF PARTIES

The following are the parties to this proceeding:

1. John E. Jordan,
plaintiff-respondent;

2. Intercontinental Bulktank Corporation,
defendant-petitioner.*

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* Pursuant to Supreme Court Rule 29.1, Intercontinental Bulktank Corporation is part of the group of companies which comprise the Overseas Shipholding Group, Inc., 1114 Avenue of the Americas, New York, NY 10036.

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DECISIONS BELOW

The decision of the Louisiana Court of Appeal is reported at 621 So.2d 1141 (La.App. 1st Cir. 1993), and is reproduced in Appendix A. (App. pp. 1a-40a.) On April 28, 1993, the Louisiana First Circuit denied the application for rehearing filed by Intercontinental Bulktank Corporation (hereinafter "IBC"), which order is reproduced in Appendix B. (App. p.41a.)

On September 17, 1993, the Supreme Court of Louisiana denied the applications for writs of *certiorari* filed by plaintiff and IBC, which are reported at 623 So.2d 1335 and 623 So.2d 1336, respectively, and reproduced in Appendices C and D. (App. pp. 42a-43a and 44a-45a.)

On September 24, 1993, the Louisiana Supreme Court stayed the execution and enforcement of the judgment of the Louisiana First Circuit for ninety days, pending IBC's petition to this Court, which order is reproduced in Appendix E. (App. p. 46a.) On October 8, 1993, the Louisiana Supreme Court denied Jordan's motion to reconsider that order, which is reported at ____ So.2d ____, and reproduced in Appendix F. (App. pp. 47a-48a.)

JURISDICTION

On February 19, 1993, a three judge majority of the Louisiana First Circuit Court of Appeal entered the judgment from which IBC seeks review. On April 28, 1993, the same three judge majority denied IBC's application for rehearing.

IBC timely filed its application for writs of *certiorari* or review with the Supreme Court of Louisiana, which the court denied on September 17, 1993. This Honorable Court has jurisdiction pursuant to 28 U.S.C. §1257 and Rule 10 of the Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following amendments to the Constitution of the

United States are involved in this petition:

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following statute is involved in this petition:

46 U.S.C. §688(a)(The Jones Act):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such a seaman may maintain an action for damages at law with the right to trial by jury, and in such action all statutes of the United States conferring or regulating the right of

action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

STATEMENT OF THE CASE

On July 17, 1988, Jordan sued IBC in the Eighteenth Judicial District Court, West Baton Rouge Parish, seeking damages for injuries sustained in an accident on June 2, 1988, for negligence under the Jones Act (46 U.S.C. §688) and unseaworthiness under the general maritime law. Jordan also sought unpaid maintenance and cure, and punitive damages and attorneys' fees for IBC's alleged willful and wanton failure to pay maintenance and cure.

The jury trial began on June 15, 1990. To authenticate correspondence concerning maintenance and cure counsel for Jordan allegedly sent to counsel for IBC, Jordan called his counsel (Terry Bell) as a witness. (R. Vol. 2, pp. 264-303, reproduced in Appendix H, pp. 54a - 96a.) Bell's testimony was not limited to identifying correspondence but improperly included his legal opinion of IBC's maintenance and cure obligation. IBC objected to Bell's testimony as violating Louisiana Rule of Professional Conduct 3.7(a) and unduly prejudicing IBC by allowing Bell to merge the roles of advocate and "disinterested" witness. (R. Vol. 2, pp. 265-67, App. H, pp. 54a - 55a.) The trial court overruled the objection. At the conclusion of Bell's testimony, IBC moved for a mistrial and to disqualify Bell as Jordan's counsel; both motions were denied. (R. Vol. 2., pp. 297, 302-03, App. H, pp. 91a - 96a.) IBC then filed an application for emergency writ with the First Circuit which was denied that afternoon.

On the second day of trial, Jordan engaged several jurors in conversation, in violation of the trial judge's specific instructions. (R. Vol. 3, pp. 670-75, reproduced in Appendix I, pp. 97a - 100a.) Arguing this conduct prejudiced the jury in favor of Jordan, IBC moved for a mistrial.

The trial court, after speaking privately with the jurors, but without revealing the substance of the conversation in any detail, denied the motion. (R. Vol. 3, pp. 674-75, App. I, pp. 100a - 101a.)

At the close of IBC's case, the trial court granted Jordan's motion for directed verdict on the issue of unpaid maintenance and cure and awarded maintenance to the date of trial at $17.00 per day for a total of $12,665.00, subject to an offset of $4,144.00 maintenance IBC had paid and rejecting the $8.00 per day maintenance rate set forth in the union collective bargaining agreement. Adding medical expenses not paid by the Seafarer's Welfare Plan (a program designed to pay seamen's medical expenses funded entirely by employers of union seaman) and crediting IBC for sums already paid to Jordan ($4,144.00), the trial court fixed the total amount of maintenance and cure due at $11,050.20.

The jury returned a verdict in Jordan's favor on both his Jones Act negligence and general maritime law unseaworthiness claims, awarding damages for: (1) lost wages - $250,000.00; (2) mental anguish - $125,000; (3) past and future physicial pain and suffering - $150,000; and (4) past and future mental pain and suffering - $125,000.00. The jury found IBC arbitrary and capricious in failing to pay maintenance and cure timely and awarded punitive damages of $1,000,000.00, and the district court entered judgment in accordance with those findings. (Judgment, reproduced in G, pp. 49a - 53a.)

IBC moved for a new trial on several bases, including that plaintiff's counsel was allowed to testify as a witness concerning punitive damages; plaintiff fraternized with several of the jurors during the trial; and, because during closing argument plaintiff's counsel repeatedly referred to another case allegedly involving IBC in which a jury had awarded punitive damage, as to which there was no evidence in the record. The motion for new trial was denied without briefing, oral argument, or assignment of written reasons.

Faced with the extremely onerous bonding require

ment of the punitive damage award, IBC sought supervisory writs with the Louisiana First Circuit prior to appeal. A divided panel denied the application on the basis that IBC had an adequate remedy on appeal. One judge dissented, stating that the case should be "remand[ed] to the trial court for a new trial on the issue of punitive damages."

IBC appealed the judgment and rulings of the district court which: (1) allowed plaintiff's counsel to testify on the issue of punitive damages; (2) directed a verdict on the issue of maintenance and cure; (3) allowed plaintiff to communicate with the jury; (4) awarded duplicative damages for both mental anguish and pain and suffering; and (5) awarded $1,000,000 in punitive damages on the basis that such was unconstitutionally excessive and denied IBC procedural due process of law pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution.

On February 19, 1993, a three judge majority of a five judge panel of the Louisiana First Circuit affirmed in part and reversed in part the judgment of the trial court. (App. A, pp. 1a - 40a.) Among other rulings, the court followed the majority rule of the general maritime law and enforced the $8.00 per day rate in the collective bargaining agreement between Jordan's union and IBC, and reduced the award of maintenance from $8,521.00 to $1,816.00, which when combined with unpaid cure totaled $4,345.20 (App. A, pp. 26a - 27a.) The Louisiana First Circuit did not address the alleged constitutional defects in the award of punitive damages but rather concluded that the award was excessive under Louisiana law and reduced the award from $1,000,000.00 to $500,000.00. (App. A, pp. 31a - 32a.)

Two of the judges dissented because the cumulative effect of permitting Jordan's counsel to testify and allowing Jordan to communicate with the jury denied IBC a fair trial. (App. A, pp. 36a - 40a)(Shortess, J., joined by Gonzales, J. dissenting). Judge Gonzales filed a separate dissenting opinion noting that the award of $500,000.00 in punitive damages was the largest punitive damage award

ever assessed for a delay in paying maintenance and cure, and was an abuse of discretion given the minimal amount the majority concluded was owed. That judge concluded that the largest permissible award was $150,000.00. (App. A, pp. 39a - 40a (Gonzales, J., dissenting.)

On March 5, 1993, IBC applied for rehearing with the First Circuit seeking reconsideration of the constitutionality of the punitive damage award pursuant to the decision of *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032 (1991), which had been decided subsequent to the filing of the initial briefs. On April 28, 1993, the First Circuit, by a three to two divided panel, denied rehearing. (App. B, p. 41a.) Two of the judges would have granted rehearing for the reasons stated in their dissents.

On May 28, 1993, IBC filed an application for writ of *certiorari* or review with the Louisiana Supreme Court. In its application for the writ, IBC sought review of the same issues presented to this Court in addition to several issues pertaining to Louisiana law for which IBC does not seek review before this Court. Jordan also filed an application for writ of *certiorari* or review with the Louisiana Supreme Court. On September 17, 1993, five judges denied IBC and plaintiff's applications for the writs with two indicating the writ should be accepted. (623 So.2d 1335-36, Apps. C & D, pp. 42a - 43a and 44a - 45a.)

On September 24, 1993, the Louisiana Supreme Court stayed the execution of the judgment of the Louisiana First Circuit for ninety days pending IBC's petition to this Court. (App. E, p. 46a.) On October 8, 1993, that Court denied Jordan's motion to reconsider that order. (App. F, pp. 47a - 48a.)

REASONS FOR GRANTING THE WRIT

I. PUNITIVE DAMAGES ARE NOT AVAILABLE, AS A MATTER OF LAW, FOR THE ARBITRARY AND CAPRICIOUS FAILURE TO PAY MAINTENANCE AND CURE.

IBC has challenged the constitutionality of the award of punitive damages for its arbitrary and capricious

failure to pay Jordan maintenance and cure, as violative of its rights to procedural due process of law. However, IBC submits the Court initially must resolve whether punitive damages are recoverable as a matter of law in this federal maritime action, as this Court has never upheld such an award. Such inquiry is proper as the Court ordinarily will defer discussion of constitutional issues if other non-constitutional grounds, such as statutory construction or application of the law, will dispose of the issue. *Hagans v. Levine,* 415 U.S. 528, 547 n. 12, 94 S.Ct. 1372, 1384 n. 12 (1974); *Ashwand v. Tennessee Valley Auth.,* 297 U.S. 288, 347, 56 S.Ct. 466, 483 (1936)(Brandeis, J., concurring).

The Court should grant *certiorari* to resolve a longstanding split in the circuit courts of appeals as to whether an arbitrary and capricious delay by a vessel owner in paying maintenance and cure to a seaman can give rise to punitive damages. Punitive damages are allowed by the First and Fifth Circuits based upon the *dissenting* opinion in *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997 (1962). See *Robinson v. Pocahontas Inc.,* 477 F.2d 1048 (1st Cir. 1973); *Holmes v. J. Ray McDermott Co., Inc.,* 734 F.2d 1110 (5th Cir. 1989). The Second Circuit, following the majority opinion in *Vaughn,* allows only compensatory damages, including attorney's fees. *Kraljic v. Berman Enter., Inc.,* 575 F.2d 412 (2nd Cir. 1978).

Although widely and *erroneously* cited as authority for the proposition that punitive damages are available for the failure to provide maintenance and cure, *Vaughan* holds only that a seaman can recover "damages suffered," not punitive damages. The defendants in *Vaughan* were found to have been callous in not investigating Vaughan's claim. "[B]y their silence neither admitting or denying it," Vaughan was forced to retain a lawyer "to get what was plainly due," maintenance and cure. "While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physicial handicap which follows (*The Iroquois,* 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955), the recovery may also include 'necessary expenses.' " *Vaughan,* 369 U.S. at 530, 82 S.Ct. at 999. "It is difficult

to imagine a clearer case of *damages suffered* for failure to pay maintenance and cure than this one." *Id.* at 531, 82 S.Ct. at 999-1000 (emphasis added).

The choice of the language "damages suffered" clearly shows the Court awarded compensatory damages, not punitive damages. As the unreasonable conduct of the defendants required Vaughan to incur attorney's fees, this Court held he was entitled to recover these attorney's fees as his "necessary expenses."

In his *dissent*, Justice Stewart (joined only by Justice Harlan) argued "[I]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with the traditional concepts of the law of damages." *Id.* at 540, 82 S.Ct. at 1004. The dissent's discussion of exemplary damages shows the issue of punitive damages was before the Court. The clear majority, however, rejected such, holding instead the seaman should be compensated for his "necessary expenses" and "damages suffered."

In *Robinson*, the First Circuit held punitive damages were available to a seaman for his employer's refusal to pay maintenance and cure. To support this holding, the court cited Justice Stewart's *dissent* in *Vaughan*, which the First Circuit incredibly described as "dissenting primarily on the question of the extent of a seaman's recovery for maintenance and cure but seemingly in agreement with the majority's fundamental premise." *Robinson*, 477 F.2d at 1051. This misstates the holding of *Vaughan* and gives improper weight to the dissenting opinion. The question is not whether the dissenting opinion agreed with any or all of the majority's premise, but whether the majority accepted the dissent's position. The *Vaughan* majority carefully stated the seaman was entitled to recover the "damages suffered." *Vaughan*, 369 U.S. at 531, 82 S.Ct. at 999-1000. The *Robinson* court can not justify the leap it makes to hold that *Vaughan* authorizes the award of punitive damages.

The *Holmes* decision was the first Fifth Circuit case to award substantial, truly punitive damages for failure to provide maintenance and cure. The Fifth Circuit held that while *Vaughan* allowed recovery of attorney's fees, subsequent cases allowed recovery of punitive damages. *Holmes*, 734 F.2d at 1118 (citing *In Re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.), *reh'g denied*, 659 F.2d 1079 (5th Cir. 1981) (table) and *Robinson, supra*). IBC suggests *Merry Shipping* did not concern maintenance and cure and, as noted, *Robinson* clearly misinterpreted the holding of *Vaughan*. Moreover, IBC submits, *infra*, that the reasoning of *Merry Shipping* has been overruled by *Miles v. Apex Marine Corp*, 498 U.S. 19, 111 S.Ct. 317 (1990).

In *Kraljic*, the Second Circuit held that the damages available to a seaman for the failure to provide maintenance and cure were limited to compensatory damages including attorney's fees. *Kraljic*, 575 F.2d at 414-15. See also *Owens v. Conticarriers & Terminals, Inc.*, 591 F.Supp. 777, 792 (W.D. Tenn. 1984). That court properly criticized *Robinson* for following the dissent of *Vaughan* rather than the majority.

This Court should grant *certiorari* as its opinion in *Vaughan*, followed by the Second Circuit in *Kraljic*, limits a seaman's recovery for his employer's failure to pay maintenance and cure to compensatory damages and attorneys' fees.

A. *Miles v. Apex Marine* provides the applicable analysis of this issue.

In *Miles*, this Court in an 8-0 decision held recovery for loss of society was not available under the general maritime law to *any* beneficiary of a true seaman and denied recovery of future loss of earnings to the estate of a deceased seaman, even if there is a general maritime law survival action. The Court's decision made it abundantly clear that, under the Jones Act or the *general maritime law*, a seaman's or his beneficiary's recovery is limited to those damages provided by the statute enacted specifically to deal with seamen's rights — The Jones Act, 46 U.S.C. §688.

The Court stated:

> Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles.
>
> * * *
>
> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." *Moragne, supra,* at 892. Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty court is not free to go beyond those limits.

Id. at 24, 111 S.Ct. at 321.

The *Miles* court was quite clear in its reliance upon relevant statutes as guidelines for judge-made law. Questioning the license of courts to fill gaps left by statutes, the Court noted:

> But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Higginbotham, supra,* at 625.

Id. at 31, 111 S.Ct. at 325.

> Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation of damages as well.

Id. at 32, 111 S.Ct. at 325.

Perhaps the clearest message was Justice O'Connor's statement that:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

Id. at 32-33, 111 S.Ct. at 326.

The right to maintenance and cure, like a seaman's right to damages for breach of the warranty of seaworthiness, is based upon a *quasi*-contractual obligation and exists even absent fault. The Jones Act clearly does not permit recovery of non-pecuniary damages, in either a death or an injury case. See *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 190 (1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992). Thus, the Court's guidelines in *Miles* prohibit awarding other than compensatory damages in any action involving a Jones Act seaman, whether the vehicle for recovery be the Jones Act or a general maritime law *quasi*-contract remedy for unseaworthiness, for maintenance and cure, or for damages for the failure to provide maintenance and cure. As Justice O'Conner stated:

> Because this case involves the death of a seaman, we must look to the Jones Act.
>
> * * *
>
> Congress has limited the survival right for seamen's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses the more expansive remedies in a general maritime action founded on strict liability.
>
> * * *
>
> Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under the general maritime law.

Miles, 498 U.S. at 36, 111 S.Ct. at 328.

In *Murray* and *Michel*, separate panels of the Fifth Circuit applied the *Miles* holding that seaman's beneficiaries are entitled only to pecuniary damages to *injury* claims by Jones Act seamen brought under the general maritime law. Although *Murray* and *Michel* involved loss of consortium, their rationale applies equally to punitive damages.

B. *Miles v. Apex Marine* bars the recovery of punitive damages by seamen.

In *Miller v. American President Line, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, ____ U.S. ____, 114 S.Ct. 304 (1993), the Sixth Circuit squarely held punitive damages were not recoverable under the general maritime law for unseaworthiness based on *Miles'* holding that the Jones Act and the damages thereunder through the incorporation of the FELA, 45 U.S.C. §51 *et seq.*, were the sole damages for a seaman, whether he proceeded under the Jones Act or pursued a general maritime law claim. "Looking primarily to the federal maritime wrongful death statutes for guidance, we hold that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman." *Id.* at 1459.

Likewise, in *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), the Second Circuit concluded the analysis of *Miles*, the Jones Act, and the Death on the High Seas Act (DOHSA), 46 U.S.C. §§761-767, precluded the award of punitive damages to Wahlstrom's estate for his wrongful death arising out of the collision of his jet-ski and a vessel on navigable waters. "We are in general agreement with the view that plaintiffs who are not allowed by general maritime law to seek nonpecuniary damages for loss of society should also be barred from seeking nonpecuniary punitive damages." *Id.* at 1094. Cf. *Mistich v. Pipelines, Inc.*, 609 So.2d 921, 935 (La. App. 4th Cir. 1992), *writ denied*, 613 So.2d 996 (La. 1993), *cert. denied*, ____ U.S. ____, 113 S.Ct. 3020 (1993)(distinguishing loss of society, a nonpecuniary but compensatory award barred by *Miles*, and punitive damages, a nonpecuniary and non-compensatory award, which purportedly are not addressed by *Miles*).

Additionally, with few exceptions, the various U.S. District Courts considering whether *Miles* prohibits the award of punitive damages to a Jones Act seaman in an action for unseaworthiness under the general maritime law,

have held *Miles* prohibits such award.[1] Several courts also base this prohibition on the fact that unseaworthiness, liability without fault, can not provide a vehicle for recovery of damages due to gross negligence or willful or wanton conduct, as such obviously involved *negligence*, and a seaman's only remedy against his employer for negligence is the Jones Act. See *e.g. Haltom v. Lykes Bros. S.S. Co.*, 771 F.Supp. 179 (E.D. Tex. 1991); *In Re Mardoc Asbestos Cases*, 768 F.Supp 595 (E.D. Mich. 1991).

Subsequent to *Miles*, several courts have considered whether a Jones Act seaman can recover punitive damages for failure to provide maintenance and cure. Two of these cases, *LaVoie v. Kualoa Ranch & Activity Club, Inc.*, 797 F.Supp. 827 (D. Hawaii 1992) and *Gray v. Texaco, Inc.*, 610 So.2d 1090 (La. App. 3rd Cir. 1992), *writs denied*, 616 So.2d 686, 687 (La. 1993), have properly denied recovery of punitive damages for failure to provide maintenance and cure in a claim under the general maritime law brought by a Jones Act seaman. Both decisions properly base their opinions on the clear guidelines set forth in *Miles*.

Several U.S. District Courts have held a Jones Act seaman can recover punitive damages for his employer's failure to provide maintenance and cure, where the failure was unreasonable, arbitrary, capricious, willful or

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[1] *Horsley v. Mobil Oil Corp.*, 825 F.Supp. 424 (D. Mass. 1993); *Boykin v. Bergesen D.Y. A/S*, 822 F.Supp. 324 (E.D. Va. 1993); *Boyette v. Keene Corp.*, 815 F.Supp. 204 (E.D. Tex. 1993); *Ortega v. Oceantrawl, Inc.*, 822 F.Supp. 621 (D. Alaska 1992); *Jackson v. Unisea, Inc.*, 824 F.Supp. 895 (D. Alaska 1992); *Matter of Waterman S.S. Corp.*, 780 F.Supp. 1093 (E.D. La. 1992); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *Petition of Cleveland Tankers, Inc.*, 791 F.Supp. 679 (E.D. Mich. 1992); *LaVoie v. Kualoa Ranch & Activity Club, Inc.*, 797 F.Supp. 827 (D. Haw. 1992); *Ellison v. Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992); *Haltom v. Lykes Bros. S.S. Co.*, 771 F.Supp. 179 (E.D. Tex. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 943 (D.R.I. 1991); *In Re Mardoc Asbestos Cases*, 768 F. Supp. 595 (E.D. Mich. 1991); *Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); Cf. *Duplantis v. Texaco, Inc.*, 771 F.Supp. 787 (E.D. La. 1991).

wanton.[2] However, IBC submits that the reasoning of those courts — generally allowing punitive damages for failure to provide maintenance and cure because it is a remedy based on contract, and because it has no statutory counterpart—is faulty and in conflict with the guidelines set forth in *Miles* and as recognized and discussed in *Miller* and *Wahlstrom.*

Representative of several of such decisions, is *Howard v. Atlantic & Pacific Marine Corp.*, 1992 WL 55487 (E.D. La. 1992), where the court reasons that:

> However, unlike unseaworthiness and negligence claims, maintenance and cure claims have no counterpart under the Jones Act or the DOHSA. A seaman's right to maintenance and cure is implied in the employment contract between seaman and shipowner, and it is "in no sense predicated upon the fault or negligence of the shipowner," citing *Brister v. AWI, Inc.*, 946 F.2d 350 (5th Cir. 1991).

Howard, supra, at p. 2.

This is the same argument the defendants faced in *Miles.* Unseaworthiness has "no counterpart under the Jones Act," and unseaworthiness is not predicated upon fault or negligence of the shipowner. Unseaworthiness involves a breach of the *warranty* to provide a seaworthy vessel — a contractual concept demonstrating the obligations of the shipowner to seamen who serve aboard his vessels.

Moreover, while the district court correctly quoted *Brister* that the maintenance and cure obligation is not predicated upon fault or negligence of the shipowner, this Court (*Cortes v. Baltimore Insular Line,* 287 U.S. 367, 53 S.Ct. 173 (1939)), the U.S. Fifth Circuit Court of Appeal

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[2] *Ridenour v. Holland Amer. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992); *Nelsen v. Research Corp. of Univ. of Haw.*, 805 F. Supp. 837 (D. Haw. 1992); *Ortega v. Ocean trawl, Inc.*, 822 F.Supp. 621 (D. Alaska 1992); and the reported unreported cases discussed, *infra,* pp. 14-16.

(*Picou v. American Offshore Fleet, Inc.*, 576 F.2d 585 (5th Cir. 1978)) and the Louisiana First Circuit Court of Appeal (*Hebert v. Aetna Casualty & Surety Co.*, 400 So.2d 695, 698 (La.App. 1st Cir. 1981)), all have held that *failure to provide* maintenance and/or cure *is a tort* by the employer — *cognizable under the Jones Act, Cortes, supra.* Since a seaman's only negligence right against his employer is the Jones Act, the failure to provide maintenance gives rise to a negligence claim under the Jones Act, *Miles* clearly controls and punitive damages are not allowed.

In *Anderson v. Texaco, Inc.*, 797 F.Supp. 531 (E.D. La. 1992), the court attempted to distinguish *Miles* on the theory that a punitive damage award for failure to provide maintenance and cure is "...a firmly rooted general maritime law claim...and is a contractual claim not reached by any maritime statute. Such claims do not implicate negligence or strict liability values." *Id.* at 536. IBC disputes that punitive damages for failing to provide maintenance and cure is a concept "firmly rooted in general maritime law," Cf. *Vaughan, supra.*

IBC also disagrees with the *Anderson* court that "failure to pay is a contractual claim" — as this Court (*Cortes, supra*), the U.S. Fifth Circuit Court (*Picou, supra*) and the Louisiana First Circuit Court of Appeal (*Hebert, supra*) all have held it is a tort claim which makes the Jones Act control and precludes punitive damages.

Finally, as noted, it is not dispositive that failure to provide maintenance and cure is not "reached by any maritime statute," because a seaman's general maritime law cause of action for unseaworthiness is not reached by the Jones Act or any maritime statute. However, a statute, the Jones Act, "both directs and delimits" the rights of seamen. *Miles,* 498 U.S. at 27, 111 S.Ct. at 323.

In *Rowan Companies, Inc. v. Badeaux,* 1991 WL 175541 (E.D. La. 1991), the court expressed an additional reason why it felt recovery of punitive damages for failure to provide maintenance and cure is not foreclosed by *Miles.*

As stated in *Cornish* [1991 WL 148746 (E.D. La.

> 1991)], "there is no extensive legislation from Congress with respect to maintenance and cure. Congress has left to the courts the task of 'writing the rules' on maintenance and cure.

Rowan, at p.2 (citation added).

However, there *also* is "no extensive legislation from Congress" dealing with seamen's rights to recover damages for breach of the warranty of seaworthiness, which cause of action arises only under the general maritime law.

Both the warranty of seaworthiness and maintenance and cure involve obligations arising from the nature of the seaman's employment aboard a vessel; both are based upon the concept of liability without fault. Both involve *quasi*-contractual relationships and obligations. Neither the warranty of seaworthiness nor the obligation to provide maintenance and cure are the subject of any specific legislation, and any damages recoverable for a breach of either clearly are limited by *Miles*.

While the obligation to provide maintenance and cure arises out of the contract of employment, an action for the failure to pay maintenance and cure primarily sounds in tort. In *Cortes, supra*, this Court held that when a seaman sustains damages or a "personal injury" as the result of his employer's failure to provide maintenance and cure, he has an action to recover provable damages for that "injury" under the Jones Act, 46 U.S.C. §688. *Vaughan* extended that recovery to include attorney's fees — no more. This Court should accept *certiorari* as *Vaughan* and *Miles* have limited damages for failure to pay maintenance and cure to attorney's fees and compensatory damages.

II. IF PUNITIVE DAMAGES ARE POTENTIALLY RECOVERABLE AS A MATTER OF LAW, IN THIS INSTANCE, PLAINTIFF PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT IBC'S CONDUCT WAS OF A NATURE SUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES.

Although there was considerable disagreement between the Justices of the Court concerning the scope of due process in *TXO Production Corp. v. Alliance Resources Corp.*, ____ U.S. ____, 113 S.Ct. 2711 (1993), it appears all members of this Court agree that procedural due process requires judicial review to assure there was "sufficiency of the evidence" to sustain the jury verdict. *Id.* at ____, 113 S.Ct. at 2727 (Scalia, J., joined by Thomas, J. concurring). In the instant case, both that review and the evidence were lacking.

In those courts which have held punitive damages are available for failure to provide maintenance and cure, there is a requirement of "egregious shipowner conduct exhibiting wanton and intentional disregard of a seaman's rights to justify an award of punitive damages." *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984). The Fifth Circuit held that "the willful, wanton and callous conduct required to ground an award of punitive damages requires an element of bad faith." *Id.* at 90. The "bad faith" requirement was reiterated in *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380 (5th Cir. 1985).

A shipowner cannot be subjected to punitive damages if its reasons for not providing maintenance and cure are reasonable. In *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986), the Fifth Circuit found Texaco's administrative policy requiring seamen to submit medical reports to document claims for maintenance and cure was not callous or recalcitrant and would not support an award of punitive damages.

Here, IBC at times refused to provide maintenance for certain periods because Jordan had not submitted medical reports to support his claim. As *McWilliams* holds, such a policy is justified and reasonable and should not support a finding of arbitrary and capricious behavior by the employer. Alternatively, even if requiring a seaman to submit medical reports to support his claim for maintenance is found to be unreasonable by this Court, IBC should not be penalized for following the policy ap-

proved by the Fifth Circuit in *McWilliams, supra.* In *Harper, supra,* the Fifth Circuit declined to impute bad faith to Zapata for paying what it considered to be the legal minimum rate of maintenance. Here, IBC relied on a policy bearing judicial imprimatur.

Even if IBC's policy is found to be unreasonable, IBC should not be liable for punitive damages unless it was found to be in bad faith, a finding which the evidence in this case does not support. The Fifth Circuit enunciated an escalating scale of conduct in *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987):

> [A] shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indiffernece to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

Id. at 1358.

While IBC contends punitive damages are not available as a matter of law, if this Court holds such damages are available, IBC submits the escalating scale set forth in *Morales* is the gauge against which a shipowner's conduct must be judged. The Fifth Circuit noted that on review, the jury award must be upheld if supported by *substantial evidence. Id.* at 1360. The award of punitive damages there was reversed.

In the instant case, the Louisiana First Circuit cited the *Morales* escalating scale, but applied the scale improperly to the evidence produced at trial. (App. A, p. 30a). Jordan failed to put on sufficient evidence to support a jury award of punitive damages. There was no testimony as to IBC's reasons for not providing maintenance and cure. The finding that IBC was arbitrary and capricious is not based

on "substantial evidence" as required by *Morales,* but can be based only on speculation, and must be reversed. At most, Jordan merely showed maintenance and cure had not been provided, or had not been paid timely.This alone does not support an award of punitive damages.

In *Ober v. Penrod Drilling Co.,* 726 F.2d 1035 (5th Cir. 1984), the Fifth Circuit held attorney's fees and damages for mental anguish were not available based solely on the employer's failure to pay maintenance and cure *timely.* The court held the law "do[es] not support such an award on the basis of untimely payment alone." *Id.* at 1037-38 n. 4 (citing *Vaughan* and *Blanchard v. Cheramie,* 485 F.2d 328l (5th Cir. 1973)).

Likewise, Jordan did not overcome his burden to establish that the conduct of IBC regarding maintenance and cure was arbitrary and capricious. In *Richard v. Bauer Dredging Co. Inc.,* 433 F.2d 954 (5th Cir. 1970), the Fifth Circuit overturned the district court's award of attorney fees, holding that "[t]he record simply fails to demonstrate that arbitrary or capricious conduct prerequisite to the allowance of attorney's fees in such cases." *Id.* at 955. See also *Lirette v. K&B Boat Rentals, Inc.,* 579 F.2d 968, 969 (5th Cir. 1978); *Kratzer v. Capital Marine Supply, Inc.,* 490 F.Supp. 222 (M.D. La. 1980), *aff'd,* 645 F.2d 477 (5th Cir. 1981). *Lirette* involved a seaman whose maintenance was terminated when he failed to return to work after a doctor advised him he could do so. The trial court granted plaintiff's motion for summary judgment, finding it uncontroverted that plaintiff had not reached maximum medical improvement, and thus was due maintenance and cure. However, damages and attorney's fees were not allowed because the court found the record contained insufficient evidence to show arbitrary or unreasonble conduct by K & B. *Lirette,* 579 F.2d at 969. The same result should occur here.

Even the cases which allow such require evidence in the record of the nature and motivation behind the defendant's conduct for an award of punitive damages or attorney's fees to stand. Plaintiff has the burden of proof on

this issue. Defendant need not justify or explain its conduct until plaintiff has produced evidence that the conduct of defendant supports an award of punitive damages or attorney's fees.

To recover punitive damages, the plaintiff must show more than just a failure to pay; he must prove an unreasonable failure to pay, coupled with bad faith. Where, as here, the shipowner and the seaman's union herein have arranged for the Seafarer's Medical Plan to pay the cure expenses of an injured seaman, the shipowner has discharged its duty with regard to cure. *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585 (6th Cir. 1989). Certainly, IBC's reliance on the seaman's own union to fulfill its contractual obligations under the collective bargaining agreement should not be considered "bad faith" a *fortiori.*

This Court should accept *certiorari* because there was such a deficiency of evidence to support a punitive damage award as to amount to a denial of due process.

III. THE AWARD OF AND THE AMOUNT OF PUNITIVE DAMAGES IN THIS INSTANCE VIOLATE IBC'S RIGHT TO PROCEDURAL DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.[3]

In *Haslip* and *TXO,* this Court reviewed the constitutionality of the award and assessment of punitive damages by state court juries pursuant to the common law. *Haslip* and *TXO* were the culmination of prior decisions of this Court of the past eighty years. Yet, this Court has not addressed the constitutionality of punitive damages under

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[3] The Fifth Amendment is implicated because the conduct warranting the imposition and the calculation of the amount of punitive damages for delayed payment of maintenance and cure are governed by federal admiralty law. The Fourteenth Amendment is implicated because it is a state jury and state court in this instance acting unconstitutionally. See *e.g., Johnson v. Hugo's Skateway,* 974 F.2d 1408, 1411 n. 1 (4th Cir. 1992) (*en banc*) (Fifth Amendment govened constitutionality of jury's assessment and federal court's review because those entities deprived the defendant of procedural due process.)

the admiralty and maritime law. Except for Justice Stewart's dissent in *Vaughan, supra*, the sole decision rendered by the Court concerning punitive damages in this realm was decided over one and one-half centuries ago in *The AMIABLE NANCY*, 16 U.S. (6 Wheat.) 546, 4 L.Ed. 456 (1818). In the *AMIABLE NANCY*, the crew of the SPIDER committed trespass against the AMIABLE NANCY, which brought a libel against the owners of the SPIDER. The Court agreed the AMIABLE NANCY was entitled to compensation from the owners and noted in *obiter dicta*, "If this were a suit against the original wrongdoers, it might be proper to go yet further and visit upon them in the shape of exemplary damages." *Id.* at 558. The Court, however, refused to hold the innocent owners, the only defendants before the Court, liable for such damages. *Id.* at 559.

Since 1818 the Court has not spoken on the availability or award of punitive damages under the maritime law. IBC submits this Court should grant *certiorari* to set forth the applicable constitutional analysis of punitive damages under the general maritime law, if such are available at all.

Due process essentially concerns the fundamental fairness of governmental activity. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1913, 119 L.Ed.2d 91 (1992). It requires that parties in civil litigation not be subject to arbitrary and capricious treatment by juries or courts. See *Daniels v. Williams*, 474 U.S. 337, 106 S.Ct. 662 (1986).

An award of punitive damages and the amount thereof must be supported by a preponderance of the evidence. See *Haslip*, 499 U.S. at 23 n. 11, 111 S.Ct. at 1046 n. 11 (1991). There is no rational basis, upon the evidence in this trial, to support a punitive damage verdict of $1 million as awarded by the jury, $500,000.00 as found by the three judge majority of the appellate court or even $150,000.00 as suggested by one judge, concurring in part and dissenting in part.

The evidence, or rather lack of evidence, in this case

pertaining to the award and amount of punitive damages readily is apparent from a review of the appellate court's opinion. The Louisiana First Circuit lists four factors relevant in determining the amount of punitive damages to be awarded. (App. A, p. 32a). These factors, their application and IBC's position are as follows:

1. "The nature and extent of the harm to the plaintiff." The First Circuit commented: "Jordan was unable to meet his daily living expenses or to get medical care as a result of IBC's non-payment of maintenance and cure." (App. A, p. 33a). Although this may be evidence of the potential harm to plaintiff, there was no evidence of the extent of the harm, if any. Other than the payments themselves, the plaintiff did not request any compensatory damages for the alleged failure to pay maintenance and cure timely. The extent of the alleged harm to plaintiff is unknown. The jury may have found the failure to receive maintenance and cure in fact did not result in any compensable harm to plaintiff. Of course, the jury was not charged to consider the nature and extent of the alleged harm to the plaintiff and accordingly this Court must presume the jury did not consider such.

2. "The wealth or financial situation of the defendant." The First Circuit correctly observed: "There is no evidence in the record pertaining to the financial status of IBC." (App. A., p. 33a). Obviously, the jury's verdict was not based on this factor. Interestingly, this is the only factor suggested by the trial court as guidance for the jury in "assessing the amount of the punitive damages." (R. Vol. 4, p. 1031, reproduced in Appendix J, p. 102a.) However, that instruction was meaningless, as there was no evidence concerning the financial status of the defendant.

3. "The character of the conduct involved." The First Circuit indicated: "IBC's conduct in delaying and/or refusing payments to Jordan was arbitrary and capricious." (App. A, p. 33a). This adds nothing to the discussion because it is merely the minimum level of *conduct* necessary for a jury properly to assess punitive damages

according to some courts. It is of no assistance in assessing the *amount* of punitive damages. Moreover, IBC submits there is insufficient evidence to establish arbitrary and capricious conduct, as discussed previously.

4. "The extent to which such conduct offends a sense of justice and propriety." The First Circuit commented: "IBC's choice to save a relatively small amount of money rather than fulfill its obligation to care for one of its employees injured on its vessel offends a sense of justice." (App. A, p. 33a). There is simply no evidence to support that contention. By contract, plaintiff's cure obligation was supposed to be satisfied by his own union. It is irrational to contend a shipowner should be subjected to punitive damages because plaintiff's own union does not make timely payments as required by the collective bargaining agreement between the union and IBC. There is no evidence IBC's decision was motivated by saving $1,816.00 in maintenance.

Moreover, it is inconsistent to conclude the $8.00 per day maintenance rate in the collective bargaining agreement with Jordan's union was enforceable, as the First Circuit correctly did, on one hand, but then to find IBC's obviously *reasonable* reliance on the same union to perform its obligations under the same collective bargaining agreement in terms of managing cure payments to be arbitrary and capricious, so as to subject IBC to punitive damages in any amount.

Additionally, it is impossible to know to what extent the jury's award of punitive damages was influenced by the district court's holding that IBC's payment of maintenance at the contractual rate of $8.00 per day was inappropriate. The district court found maintenance was owed at the rate of $17.00 per day, over twice the rate at which it was paid. From the evidence in the record, it is impossible to determine what effect this holding had on the jury's award of punitive damages.

* * *

In summary, there was no probative evidence to provide any basis to support a judgment for punitive damages

in any amount. The Louisiana First Circuit held "[u]nder the facts and circumstances of this case, a punitive damage award of $1 million is a clear abuse of the jury's much discretion." (App. A, p. 33a). It would seem more accurate to say the award was the result of the jury's unbridled discretion in the absence of any guidance and evidence.

Affirmance of the punitive damage award in this instance condones an irrational verdict because there is no evidence as to why a verdict in this instance should be $1,000,000.00 or $500,000.00 or even $150,000.00 as suggested by the dissent of Judge Gonzales. There was *no evidence* of the financial status of IBC, the *only* factor the trial court instructed the jury to consider in determining the *amount* of punitive damages.

The Court should accept *certiorari* to ensure IBC receives due process.

IV. THE ASSESSMENT OF AND AMOUNT OF PUNITIVE DAMAGES AWARDED IN THIS INSTANCE VIOLATE DUE PROCESS AND, THEREFORE ARE UNCONSTITUTIONAL UNDER THE *HASLIP* AND *TXO* DECISIONS.

Between the time IBC appealed and the Louisiana First Circuit rendered its decision, this Court decided *Haslip*. Between the time writs of *certiorari* were filed and denied by a divided panel of the Louisiana Supreme Court, this Court rendered the *TXO* decision.

Although the *Haslip* Court did not conclude "the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional[,]" *Haslip*, 499 U.S. at 17, 111 S.Ct. at 1043, it emphasized not every award of punitive damages automatically satisfies the concerns of due process. This Court should grant *certiorari*, as IBC has not received due process of law required by this Court in *Haslip* and *TXO*.

In affirming Alabama's method of assessing the amount of punitive damages, this Court in *Haslip*

scrutinized three aspects of that state's jury trial system that potentially offended a defendant's right to due process: (1) instructions given to the jury; (2) post-trial review by the trial court; and (3) post-trial review by the appellate court. *Id.* 20-21, 111 S.Ct. at 1044-45. IBC addresses these issues in order:

1. **The trial court's jury instructions, in this instance, did not provide even the minimum guidance needed in assessing the amount of punitive damages as required by due process and the *Haslip* decision.**

This Court in *Haslip* found the jury charge given by the trial court provided sufficient guidance to assist in rational decision making by the jury. In contrast, the jury instruction given by the district court below could not aid the jury in rational decision making.

The jury charge in *Haslip* and the jury charge in this case diverge dramatically in the guidance provided for fixing the amount of punitive damages. The instruction in *Haslip* charged: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.* at 6 n. 1, 111 S.Ct. at 1037 n. 1. The only instruction provided by the district court below charged as follows: "In assessing the amount of punitive damages, you may take into account the financial status of the defendant." (R. Vol. 4, p. 1031, App. J, p. 102a.) Of course, as previously discussed and confirmed by the Louisiana First Circuit, there was *no evidence* as to the financial status of the defendant.

Unlike *Haslip,* there was no charge here to consider the character of the wrong, no instruction to consider the degree of the wrong shown by the evidence, and no instruction to take into account the necessity of preventing a similar wrong. In sum, the jury here was directed to look at only one factor, the financial status of the defendant, in calculating the amount of punitive damages, on a record devoid of any evidence as to even that one factor.

The definitional (as opposed to instructional) portion of the jury charge pertaining to punitive damages given by the district court below was as follows:

> Punitive damages are added damages awarded for public service in bringing a wrongdoer to account, as an example to warn and deter others from repeating the same act.
>
> They are never awarded to benefit the injured party or as a matter of right, but rather to punish and to compel the wrongdoer to have due and proper regard for the rights of seamen.

(R. Vol. 4, p. 1030-31, App. J. p. 102a.)

The definition does not *instruct* the jury to consider any of the necessary factors in assessing the *amount* of damages. Moreover, it would be patently improper for the jury to consider the plaintiff's "public service" in bringing a wrongdoer to account in assessing the quantum of punitive damages. If one construes the definitional portion of the punitive damage instruction to be an instruction for assessing the amount, it can fairly be said the jury could have concluded the award of punitive damages essentially was a bounty provided to a plaintiff for bringing a wrongdoer to account. The award would impermissibly reward plaintiff's "good deed," not necessarily deter the defendant.

Therefore, this Court should accept *certiorari* to vindicate IBC's right to due process, as there was no factual or rational basis for the jury to determine the amount of punitive damages, in violation of the *Haslip* decision.

2. **There was no post-verdict review of the award of punitive damages by the trial court to ensure due process of law as required by this Court in *Haslip*.**

A second factor which led this Court to uphold the punitive damage award in *Haslip* was Alabama's established post-trial procedures for scrutinizing punitive awards. These procedures included the trial court's review of

"culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties" and "other factors, such as the impact on innocent third parties." *Haslip*, 499 U.S. at 20, 111 S.Ct. 1044 (quoting *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986)). This Court concluded that "the *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.* at 21, 111 S.Ct. at 1045. Louisiana has *no* established post-trial procedures for scrutinizing punitive damages at the trial level. Certainly no scrutiny was performed in the instant case. This Court should grant *certiorari* to mandate Louisiana's compliance with due process as required by *Haslip*.

3. There was no appellate review of the constitutionality of the punitive damage award in this instance.

The three judge majority of the Louisiana First Circuit held, "the issue of constitutional excessiveness of the punitive damage award is properly before this court.We need not address this constitutional issue; however, because we find the award excessive under Louisiana law." (App. A, p. 32a).

While IBC agrees with the appellate court holding that the $1 million dollar punitive damages award was a clear abuse of the jury's discretion and excessive under Louisiana law, the fact that it was excessive under Louisiana law does not address whether *any* award of punitive damages in this case is constitutionally excessive or impermissible under the due process clauses of the United States Constitution.

V. IBC'S RIGHT TO DUE PROCESS WAS FURTHER COMPROMISED BY PLAINTIFF FRATERNIZING WITH THE JURY DURING THE TRIAL, COMPOUNDED BY PLAINTIFF'S TRIAL COUNSEL TAKING THE STAND. DEFENDANT'S BURDEN OF PROOF, *I.E.*, TO SHOW THAT IT IS "*IMPOSSIBLE*"

FOR THE JURY TO REACH A PROPER JUDGMENT FOLLOWING THE FRATERNIZATION, AMOUNTS TO A DENIAL OF DUE PROCESS.

In *TXO,* the Court was divided over the appropriate method to ascertain a constitutionally improper punitive damage award. A comparison of the plurality opinion and the dissenting opinion, reveals seven justices agreed a jury verdict awarding punitive damages influenced by prejudice against a defendant is unconstitutional. Compare *TXO,* ____ U.S. at ____, 113 S.Ct. at 2714, with *Id.* at ____, 113 S.Ct. at 2729. (O'Connor, J., joined by White and Souter, JJ. dissenting). IBC submits the conduct of Jordan and his counsel (not to mention the district court directing a verdict that maintenance be paid at over twice the contractual rate paid by IBC, which was reversed on appeal) prejudiced the jury against IBC, warranting *certiorari.*

It is undisputed the trial court admonished the jurors not to fraternize with either party or their counsel. Nevertheless, plaintiff and several of the jurors conversed during the trial. (R. Vol. 3, pp. 670-675, App. I, pp. 97a - 100a.) It is hard to imagine an action with more potential for bringing disrepute to the entire judicial system than a party conversing with jurors during trial. The trial judge, in an *ex parte* hearing, concluded the jurors and the plaintiff were engaged in pleasantries, therefore, no harm was done. This does not resolve the matter. As cogently stated in one of the dissents in the circuit court, "It is obvious, however, that when a party converses with several of the jurors during the course of trial, he establishes a rapport with those jurors which could subliminally prejudice those jurors in his favor." (App. A, p. 37a) (Shortess, J., joined by Gonzales, J. dissenting). That the jurors and plaintiff were discussing plaintiff's family is exactly the type of contact that could cause subliminal prejudice. IBC did not engage the jury in "pleasantries" nor did the jury engage IBC in pleasantries during the trial.

According to the three judge majority of the Louisiana First Circuit, to obtain a mistrial, IBC's *burden* was

to show that "it was '*impossible* to reach a proper judgment' in the case." (App. A, p. 14a). This burden for a mistrial, which should not be on the innocent party in the first place, virtually is insurmountable. Juxtaposing the fact that IBC was assessed punitive damages, an essentially criminal sanction based on less than a preponderance of the evidence, with IBC's insurmountable burden of showing that it was *impossible* for the jury to reach a proper judgment following plaintiff's secret conversation with the jury, perhaps, highlights the absurdity of the "impossible" standard.

Two of the Louisiana First Circuit judges felt plaintiff's attorney testifying, in concert with plaintiff and the jurors' misconduct, required a mistrial, even if it were impossible for the defendant to prove prejudice. (App. A, p. 37a) (Shortess, J., joined by Gonzales, J. dissenting). They correctly felt these actions "effectively denied the defendant a fair trial." (*Id.*) Combining this with the majority opinion holding that the jury's punitive damage verdict was "a clear abuse of the jury's much discretion," reveals the actions of plaintiff and plaintiff's counsel caused passion and prejudice in the jury, resulting in the unreasonable verdict.

When a party intentionally violates the judge's order and confers with the jury — unquestionably misconduct by the party and by the jury — the better rule would require *the party at fault* to bear a heavy burden to show that the innocent party, who did no wrong, will receive a fair trial. It makes no sense to *require the innocent party to prove* it was "impossible" for it to get a fair trial due to the other party's (and jury's) unquestionably improper acts.

The Court should accept *certiorari* because as a matter of law, when *parties* are admonished not to communicate with the jury during the trial and one party chooses to do so, that action brings such disrepute to the entire legal system, a mistrial (and probably contempt sanctions) is required. IBC has been denied due process in this instance.

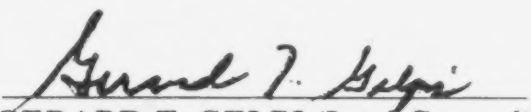
VI. THE DISTRICT COURT AND THE COURT OF APPEAL ERRED AS A MATTER OF LAW IN ALLOWING JORDAN DOUBLE RECOVERY FOR BOTH MENTAL PAIN AND SUFFERING AND MENTAL ANGUISH.

The jury's answer to special interrogatories indicates Jordan suffered damages of $125,000.00 for mental pain and suffering and $125,000.00 for mental anguish. The trial court erred as a matter of law in entering judgment awarding both damages, as "mental anguish" is the same as "mental pain and suffering." Further a review of the court's instructions confirm there is no distinction. (R. Vol. 4, pp. 1024 and 1038, Appendix K, p. 104a. and L, p. 105a, respectively.) Thus, plaintiff received double recovery.

CONCLUSION

For the foregoing reasons, IBC respectfully requests the Court grant *certiorari*.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I do hereby certify that on this 8th day of December, 1993, a copy of the foregoing pleading has been served upon all counsel for all parties to this proceeding, by mailing same United States mail, properly addressed, and first class postage prepaid.